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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1980

NO. 80-6845

DONALD GENE BOAG,

Petitioner,

vs.

ELLIS MACDOUGALL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS; and, WILLIAM RHODE, SUPERINTENDENT OF ALHAMBRA RECEPTION AND TREATMENT CENTER,

Respondents.

IN FORMA PAUPERIS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD GENE BOAG
ARIZONA STATE PRISON
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FLORENCE, AZ. 85232

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I

JURISDICTION

This courts jurisdiction is invoked pursuant to 28 U.S.C. 1254.

II

OPINIONS BELOW

On March 3,1981, the court below(APPENDIX A)affirmed the District Courts summary dismissal of petitioners 42 U.S.C. 1983 action/ complaint(APPENDIX B). On June 2nd, 1981, petitioners Petition for Rehearing and Suggestion for Rehearing In Banc was denied(APPENDIX C).

III

QUESTIONS PRESENTED

1. WHETHER CERTAIN CAUSES OF ACTION ALLEGING CIVIL/CONSTITUTIONAL VIOLATIONS IN ONE PRISON CAN BE MOOTED BY A SUBSEQUENT TRANSFER TO ANOTHER PRISON?

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURTS DISMISSAL ORDER ON DIFFERENT GROUNDS THAN THAT GIVEN BY THE DISTRICT COURT?

3. WHETHER A 42 U.S.C.1983 COMPLAINT IS FRIVILOUS WHEN IT ALLEGES, INTER ALIA, THAT PETITIONER WAS PLACED IN "THE HOLE" FOR SEVERAL DAYS, WITH LOSS OF ALL PRIVILEGES, AND WITHOUT PROCEDURAL DUE PROCESS PROTECTIONS BEING OBSERVED, I.E.-NO NOTICE OF CHARGE, AND NO OPPORTUNITY TO BE HEARD AND TO DEFEND?

4. WHETHER THE COURT BELOW ERRED IN NOT REVERSING AND REMANDING CASE TO DISTRICT COURT WITH DIRECTIONS ALLOWING PETITIONER TO FILE AN AMENDED COMPLAINT?

5. WHETHER DISTRICT COURT AND COURT BELOW ERRED IN NOT HOLDING THE MARSHAL SHOULD HAVE SERVED THE COMPLAINT/SUMMONS ON THE DEFENDANTS PRIOR TO THE SUMMARY DISMISSAL ORDER?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

14TH AMENDMENT TO THE FEDERAL CONSTITUTION

V

STATEMENT OF CASE

On Feb. 29,1980, petitioner was received by the Arizona Department of Corrections"Reception and Treatment Center", Phoenix, Arizona, where his legal documents were immediately taken from him(but, later returned after petitioner threatened legal action).

Prescribed eye medication was also confiscated,and an ineffective eye medication substituted therefor.

While at said Reception and Treatment Center,administered and operated pursuant to the rules and regulations fixed by the two Respondents,petitioners following requests were denied;(1)participation in church services;(2)a visit from a friend;(3)exercise outside and fresh air(4)access to law library/law books;and (5)access to a canteen/commissary. All requests were denied on the grounds that none of the foregoing were available to inmates at that particular institution.

On March 3,1980,petitioner was placed in "the hole" (with loss of all privileges)by an alleged drunken guard(a Sgt. Robertson) without a charge,without a notice of charge,and without an opportunity to be heard and to defend before a disciplinary committee. Petitioner remained in "the hole" until transferred to the Arizona State Prison at Florence,Az. on March 12,1980. The alleged cause of petitioners placement in "the hole" was his refusal to accept the substituted eye medication which was totally ineffective for his eye problem(i.e.- an infected eye socket. Petitioners right eyeball was enucleated in July,1966).

VI

REASONS FOR GRANTING THE WRIT

I

CERTAIN CAUSES OF ACTION ALLEGING CONSTITUTIONAL/CIVIL VIOLATIONS IN ONE PRISON CANNOT BE MOOTED BY TRANSFER TO ANOTHER PRISON.

Very simply,can a cause of action alleging,e.g.- placement in "the hole" without procedural due process/14th Amendment rights being observed become moot upon transfer to another prison(within the state system)? It is conceded that a cause of action could be moot for injunctive relief, but,not for compensatory damages.See, Lokey v. Richardson(9th Cir. 1979) 600 F.2d 1265,cert.denied 101 S.Ct. 238

II

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURTS DISMISSAL ORDER ON DIFFERENT GROUNDS THAN THAT GIVEN BY THE DISTRICT COURT.

As set forth in Argument One, the Court of Appeals affirmed the District Courts dismissal order for a different reason than that given by the District Court.

The District Court dismissed the complaint/action as being moot. Thereafter, the court below affirmed on a different ground, i.e.- that the complaint failed to state a claim upon which relief can be granted and was therefore frivilous. It must be remembered that on appeal, per a summary denial, the facts as set forth in the complaint must be deemed true.

Certainly, such "changing horses in the middle of the stream" took from petitioner the right to respond to such ground, and was error.

III

A 42 U.S.C. 1983 COMPLAINT IS NOT FRIVILOUS WHEN IT ALLEGES, INTER ALIA, THAT PETITIONER WAS PLACED IN "THE HOLE" FOR SEVERAL DAYS, WITH LOSS OF ALL PRIVILEGES WITHOUT PROCEDURAL DUE PROCESS PROTECTIONS BEING OBSERVED, I.E.-THERE WAS NO NOTICE OF CHARGE AND NO OPPORTUNITY TO BE HEARD AND TO DEFEND.

As set forth above, petitioner was placed in "the hole" for several days at the Reception and Treatment Center because he declined the ineffective eye medication. While in "the hole", petitioner lost all privileges accorded other inmates. At no time was petitioner charged with a rule or regulation infraction or was he ever given an opportunity to be heard and to defend regarding being placed in "the hole", and [redacted] losing his privileges. Certainly, it would seem, according th this courts opinions in Enomoto v. Clutchette, 425 U.S. 308, and Wolff v. McDonnell, 418 U.S. 539, such action by the respondents deprived petitioner of due process of the law guaranteed by the 14th Amendment to the UNITED STATES CONSTITUTION.

Can it be said such an allegation is frivilous and does not state a claim upon which relief can be granted??? See,eg.-Cruz v. Beto, 405 U.S. 319;Haines v. Kerner ,404 U.S. 519;Gillespi v. Civiletti (9th Cir. 1980)629 F.2d 631.[1]

Petitioner affirmatively contends that he is entitled to prove his allegations (Haines v. Kerner,supra,) ,and that his allegations clearly state claims upon which relief can be granted(Cruz v. Beto, supra).

IV

THE COURT BELOW ERRED IN NOT REVERSING AND REMANDING CASE TO DISTRICT COURT WITH DIRECTIONS ALLOWING PETITIONER TO FILE AN AMENDED COMPLAINT.

If the court below felt,in any manner, the complaint was unclear (as opposed to frivilous), it should have sent the case back to the District Court with directions that petitioner be allowed to file an amended complaint.See,Broughton v. Cutter Labratories,et al (9th Cir. 1980) 622 F.2d 458;and,Potter v. McCall(9th Cir. 1970) 433 F.2d 1087.

V

THE DISTRICT COURT SHOULD HAVE ORDERED THE U.S. MARSHAL TO SERVE SUMMONS/COMPLAINT ON THE DEFENDANTS PRIOR TO DISMISSING THE ACTION.

Petitioner contends that the 9th Circuit cases of Potter v. McCall, supra,and Crawford v. Bell (9th Cir. 1979) 599 F.2d 890, stand for the proposition that a District Court Judge is not supposed to use summary dismissal when he merely thinks the facts described in the complaint do not show that federal rights were violated,and that as long as the District Court agrees the suit would qualify for Section 1983 if petitioner suffered the violations he says he suffered, the court is required to (1) have the legal papers served on the defendants,(2)wait for the defendants to move to dismiss the complaint/action,(3) make sure petitioner gets a copy of their motion

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[1] Also, can it be said the allegation of no prison law library at said Reception and Treatment Center is a frivilous allegation??? See Younger v. Gilmore ,404 U.S.15;Bounds v. Smith(1977)430 U.S.817.

and a chance to submit a written memorandum in opposition,(4)send petitioner a statement of his reasons for granting the defendants motion,and (5) give petitioner a chance to amend the complaint.

In the present case, the District Court held the claims were "moot",[2] and on this basis,summarily dismissed the complaint/action . Then the court below affirmed on a different ground,i.e.- the claims were frivilous. Petitioner submits that the rationale of Potter and Crawford come into play in this type of situation. In other words, he feels the pleading/issue of mootness should have been made by the defendants on a motion to dismiss after having been served with the complaint/summons. It is submitted that the court below should have held this way.

VI

CONCLUSION

Because of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Donald Gene Boag

COPY OF THE FOREGOING PET.FOR WRIT OF CERTIORARI MAILED THIS 9th DAY OF June,1981 TO:JAY ADKINS,ASS'T. ATTY. GEN.,WEST ADDITION- 2nd FLR., 1700 W. WASHINGTON,PHOENIX,AZ. 85007

I, Donald Gene Boag, declare under the penalty of perjury that the foregoing is true and correct.

DATED: June 9th 1981

Donald Gene Boag

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[2] However,the court below used the term "frivilous". Quite a distinction!